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INTRODUCTION

The question applies to a specific context: Should a fiction author be able to freely quote song lyrics in her work without fearing suit for copyright infringement so long as she has properly attributed those lyrics to the original songwriter?[1] At first, it might seem that these quotations would be permissible. While quoting with proper citation is standard procedure for academic[2] and legal writing,[3] however, this is currently not thought to be sufficient for writers of fiction.[4]

In fact, the conventional wisdom for fiction authors is *not* to quote copyrighted song lyrics whatsoever in their work unless they have obtained express permission from the copyright holder.[5] Although there is currently no formal market for licensing the right to quote song lyrics in fiction, some authors have independently negotiated licensing arrangements with the copyright holder.[6] Because of these frequently expensive licensing fees, and the prospect of costly damages if found liable for infringement,[7] authors and publishers generally refrain from quoting song lyrics in their work. The status quo thus

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[1] At the outset, I should acknowledge that I have something of a vested interested in this question, as an author of fiction who would very much like to quote popular song lyrics without fear of being sued. This freedom would have helped greatly in writing a novel about the collegiate singing subculture. ACAPOLITICS: A NOVEL ABOUT COLLEGE A CAPPELLA (Aftermath Press, 2011). At the time, I followed the conventional wisdom and chose not to quote from any copyrighted material. Thus, my characters referred to the titles of popular songs in dialogue, but did not actually "sing" their lyrics. During the editing process, I was struck by how copyright conventions, if not the substantive copyright law, were restricting my creative possibilities—that is, that copyright protections were actually *changing* my story. Despite this admittedly personal interest in this area of the law, in my view the issue has much larger social consequences: The generalized fear of quoting copyrighted material places undesirable limits on many forms of creative expression and grossly distorts the nature of copyright ownership.

[2] Academic writing is especially protected by the fair use doctrine of American copyright law, and Professor Samuelson points out that the majority of the specified fair uses described in the Copyright Act of 1976 promote the scholarly goal of "knowledge creation." Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2569 (2009); *see also* Copyright Act of 1976, 17 U.S.C. § 101-107 (2000).

[3] For discussion on the acceptability of quoting popular song lyrics in legal writing, see Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531 (2007)

[4] The distinction stems from the assumed "commercial" quality of fiction, which is thought to place it outside the statutory exception for scholarly use. *See* The Copyright Act of 1976, 17 U.S.C. § 107 (2000); *see also* note 64 and accompanying text.

[5] For discussion of this conventional advice in book publishing against quoting copyrighted material, see note 26 and accompanying text.

[6] *See infra* notes 31-32 and accompanying text.

[7] The remedies for copyright infringement in the United States are exhaustive. *See generally* notes 139-148 and accompanying text.

produces a "chilling effect"[8] on this specific type of intertextuality,[9] even as various forms of "transformative use,"[10] such as musical remixes,[11] are becoming an important part of our modern creative economy. Unfortunately, there has been very little case law in this area[12] and almost no scholarship devoted to this type of iterative transformative use.[13]

This Article proposes that, in certain cases, lyrical quotations by fiction authors should be protected by the copyright doctrine of fair use. The proposal outlined would best satisfy the basic policy rationale of fair use, which the Supreme Court has articulated as "permit[ting] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[14]

This Article examines the question in stages: Part I considers the problems faced by authors who seek to quote song lyrics under the current publishing regime, using a fictional hypothetical fact pattern. Part II relates the history of fair use law in the United States, and applies that doctrine to the specific question of quoting song lyrics in fiction. Part III examines possible reasons that major trade publishers[15] are currently reluctant to experiment with the fair use defense in these cases. Part IV proposes a pragmatic solution to clarify this uncertainty in fair use law, which admittedly will require courageous fiction writers to take some carefully calculated risks.

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[8] Legal scholars have attributed this chilling effect to various causes. Professor Liu attributes it to "uncertainty" in the scope of copyright law coverage. Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM J.L. & ARTS 429, 451 (2007) ("[P]rotecting free speech interests requires us not only to be content with the mere existence of [free speech] safeguards, but to think seriously about reducing the chilling effect of uncertainty . . ."). Professor Gibson attributes it to "risk aversion," primarily because of the desire to avoid litigation. *See generally* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007). Both causes of the chilling effect are relevant to the situation described in this Article.

[9] "Employed as a literary device, intertextuality operates in a number of ways. Some texts, for example, are simply informed by others. Consciously or subconsciously, writers incorporate references, allusions and stories from other texts. These borrowed elements may come from the public domain or other protected works. They may be facts, ideas, expressive passages or scenes a faire." Ashley Packard, *Copyright Term Extensions, The Public Domain And Intertexuality Intertwined*, 10 J. INTELL. PROP. L. 1, 25 (2002) (citing intertexuality as a device in the work of William Shakespeare, Mark Twain, Wolfgang Mozart, Ludwig Beethoven, Groucho Marx, and several Walt Disney films).

[10] While there are slight differences in usage in the field of intellectual property law, this Article refers to transformative use according to Professor Samuelson's definition: "[when] authors transformatively adapt expression from existing works even when not doing so to criticize the earlier work . . . but rather as an expression of artistic imagination." Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2553 (2009).

[11] Perhaps the most prevalent example of transformative use is a musical remix which "samples" audio from a prerecorded song. *See* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

[12] *See infra* note 51.

[13] *See infra* note 52.

[14] Stewart v. Abend*,* 495 U.S. 207, 236 (1990); *see also* notes 61-63 and accompanying text.

[15] The focus of this Article is trade publishing – books published for the general consumer – as opposed to professional or scholarly publishing, educational publishing, university presses, or alternative media. Educational publishing would present a different legal issue, as certain types of "scholarly" uses are expressly protected by the statute. *See* Copyright Act of 1976. 17 U.S.C. § 107 (2000); *see also infra* notes 35-36 and accompanying text.

I. THE PROBLEM FOR AUTHORS WHO WANT TO QUOTE SONG LYRICS

A common criticism of the fair use doctrine of the American copyright regime is its ambiguity, that there is not an established standard for what constitutes a legitimate and protected fair use.[16] The Supreme Court has held, however, that this flexibility is specifically required by statute, finding that Section 107 of the Copyright Act of 1976 requires a "case-by-case determination whether a particular use is fair."[17] Because of the case-by-case nature of fair use law, it seems most reasonable to analyze fair use within the context of a particular set of facts. In order to analyze the problem suffered by authors who want to quote song lyrics, this Article proposes a hypothetical fact pattern. True to form, all names and facts are fictional. At the same time, the challenges of our imaginary author—Alice—likely resemble problems that real-life fiction writers might suffer when facing the issue of whether to quote song lyrics in their work.

A. A Hypothetical Author's Plight

Alice Author is writing a novel set in 1968, the height of the hippie youth movement. Her preferred genre is historical fiction, and it is important to her aesthetic ambitions to adopt a highly realistic style:[18] She wants the reader to feel as if they are actually living with the characters in the year in which events take place. In the book's most climactic scene, Alice's protagonist drives off into the sunset in her red Buick Riviera, escaping the narrow-minded (read: hippie hating) small town in which she was raised. As she speeds down the highway, Alison wants her character to hear[19] the 1967 hit song "Freedom Rocks" by the Beatfellas. A real-life band,[20] the Beatfellas were the most popular band of the 60s, and continue to be highly well-regarded and recognized at the time Alice is writing her novel. In fact, Alice recently heard the song "Freedom Rocks" playing at the intermission of the Pro Football game last weekend to energize the

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[16] David Orr, *When Quoting Verse, One Must Be Terse*, N.Y. TIMES, Sept. 8, 2011, at A31, *available at* http://www.nytimes.com/2011/09/09/opinion/when-quoting-verse-one-must-be terse.html; *but see* Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2537 (2009) (arguing that the copyright fair use caselaw is "more predictable and more coherent than many commentators seem to believe").

[17] Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 549 (U.S. 1985). "The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis . . . Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994). *See also* Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (U.S. 1984).

[18] "Realism, in the arts, [is] the accurate, detailed, unembellished description of nature or of contemporary life." Realism, BRITANNICA ACADEMIC EDITION, http://www.britannica.com/EBchecked/topic/493052/realism. In literature specifically, the movement of "realism" has generally been associated with major social ills, such as poverty. *Id.* For the purposes of the fictional fact pattern, however, Alice's objective is simply to create a realistically lifelike work.

[19] By nature of the medium of prose, the literary character's "hearing" the song lyrics would involve reprinting those same lyrics on the printed page. Should the originality of the prose surrounding a particular quote effect the court's ruling on whether or not there was copyright infringement? For an argument that courts should give more protection where the use is "transformative" rather than merely reproductive, see Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2577 (2009). For discussion of how the reader might "hear" the reproduced song lyrics, see note 30.

[20] That is, a band which is nonfictional for the purposes of this fictional fact pattern.

crowd, and everyone near her in the stands was singing along to the familiar chorus.[21] Alison believes that it is both of narrative importance for her main character to hear the song at this point in the novel, and important to sustain the realistic feel of the work.

Alice writes the scene quoting exactly one line from the famous chorus – "Freedom means rocking to your own guitar."[22] In her acknowledgments section at the back of the book, Alice cites the Beatfellas as the "authors" of this lyrical line. She believes the song's origin should be fairly common knowledge, but she nonetheless includes the attribution to avoid any accusations of plagiarism.[23]

Alice is using a very small publisher to publish her book,[24] IndiePress, which specializes in literary fiction. As IndiePress is a little short-staffed, Alice is herself

[21] If song lyrics are so well-known that virtually every citizen within a defined community knows them, the typical author might think it is more acceptable for them to quote those lyrics in their work. Just as the popularity of the song lyrics might be a relevant consideration for an author, the courts likely take into account the popularity of the work in assessing the question of fair use, even if this consideration is not necessarily suggested by the statutory fair uses factors. *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 610 (2d Cir. 2006) (holding publisher's use of famous posters of classic rock band, The Grateful Dead, was fair use because readers would recognize the posters as "historical artifacts.").

[22] Frequently, as here, a repeated lyrical phrase is also the source of the song's title. Consider this chorus from the real-life band, The Beatles: "Let it be, let it be / Let it be, let it be / Whisper words of wisdom / Let it be." THE BEATLES, *Let It Be*, *on Let it Be* (Apple Records 1970). The song's title, of course, comes straight from the repeated chorus. However, "it is well-established that titles . . . are not protected by copyright." Sweet v. City of Chicago, 953 F. Supp. 223 (N.D. Ill. 1996). "Although the title of a copyrighted work should be taken into account if the same title is applied to a work copied from it, titles by themselves are not subject to copyright protection." Peters v. West, 766 F. Supp. 2d 742, 748 (N.D. Ill. 2011) (finding rap artist Kanye West did not violate Peters' copyright ownership by writing and releasing a track which was also titled "Stronger.") When there is such significant overlap between the lyrics and the title, is there any real copyright infringement? In other words, is it sensible policy to hold writers liable for quoting "words of wisdom: Let it Be" when simply writing "Let it Be" would be entirely permissible as a literary title? The contours of this argument are further discussed in the analysis of Alice's fair use defense. *See* Part II.

[23] If there is any civil claim for plagiarism, it would fall under the tort of misappropriation. In the United States, the tort of misappropriation originated in International News Service v. Associated Press, 248 U.S. 215 (1918). The *INS* decision held that one news service engaged in unfair competition when it copied or paraphrased another service's uncopyrighted news stories. *Id.* at 246. The court poetically defined misappropriation as a violation of the principle of "*sic utere tuo*," etc. that is, Use what is yours in a way that you don't harm what is another's. *Id.* at 241. More recent courts have held that competition between the parties is an essential element of the misappropriation tort, and that the copying must have a deleterious "competitive effect" on the original work. The National Basketball Ass'n and NBA Properties, Inc. v. Motorola, 105 F.3d 841, 853 (2d Cir. 1997). As there is no evidence that Alice's novel is competing with the Beatfellas' music, a successful claim of misappropriation seems unlikely. The issue of whether Alice's use is causing commercial harm to the Beatfellas' copyrighted material, or whether the use might positively benefit the original work, is discussed later in this Article. *See* Part II.

[24] Alternatively, Alice might have decided to self-publish. While this might subject her to increased legal liability, self-publishing has become extremely common among both new and highly successful writers. *See generally* Neal Pollack, *The Case for Self-Publishing*, N.Y. TIMES, May 20, 2011, http://www.nytimes.com/2011/05/22/books/review/the-case-for-self-publishing.html (noting that while the vast majority of self-published books do not find widespread commercial success, most books released by corporate publishers also fail to make money for the writer or the company); Kiri Blakeley, *Who Wants to Be a (Kindle) Millionaire?*, FORBES, March 6, 2011,

responsible for researching any legal issues involved in the publication of her novel.[25] She carefully researches online to make sure that she can legally quote the Beatfellas' lyrics in her book. To her surprise, she finds a plethora of websites warning her *not* to quote song lyrics in her work without receiving express permission in the form of a license.[26]

While researching the internet to determine how she might go about purchasing a license for her type of use, Alice stumbles upon LicensingCorp,[27] the music administrator for Beatfellas' music.[28] LicensingCorp provides licenses for traditional musical uses such as "public performance,"[29] and allows businesses and individuals to purchase these licenses quickly and conveniently through its website.

But Alice's use does not entail this sort of public musical performance,[30] and she discovers no comparable licensing company for the quotation of song lyrics in prose.[31]

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http://www.forbes.com/sites/kiriblakeley/2011/03/06/who-wants-to-be-a-kindle-millionaire/ (proposing that, with e-book sales vastly exceeding paperback and hardcover sales online, it makes more financial sense for an author to self-publish via Kindle). The E-book Movement itself presents a whole host of other fair use issues not to be addressed in this Article. *See* Jason Cohen, Note, *Endangered Research: The Proliferation of E-Books and Their Potential Threat to the Fair Use Clause*, 9 J. INTELL. PROP. L. 163 (2001).

[25] For discussion of the legal liability of major publishers for the books they publish, see Jeffrey M. Thomas, Comment, *Willful Copyright Infringement: In Search of a Standard*, 65 WASH. L. REV. 903 (1990). MusicCorp would almost undoubtedly sue IndiePress in addition to Alice because the publishing company would have more financial resources than an individual. As in other areas of tort, "deep pockets" play a pronounced role in copyright. *See* James Gibson, James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 906 (2007) ("In sum, copyright's doctrinal feedback is most pronounced in big-money industries like film, music, and publishing that combine literal takings with high costs, deep pockets, and multi-tiered distribution.").

[26] The United States Copyright Office website is one of many internet search results for this topic. The Copyright Office provides the following advice: "There are circumstances under the fair use doctrine where a quote or a sample may be used without permission. However, in cases of doubt, the Copyright Office recommends that permission be obtained." *Can I Use Someone Else's Work? Can Someone Else Use Mine?*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/help/faq/faq-fairuse.html (last revised Oct. 6, 2009).

[27] The United States has exactly three of these performance rights organizations: Broadcast Music, Inc. (BMI); the American Society of Composers, Authors and Publishers (ASCAP); and, smallest of the three, the Society of European Stage Authors & Composers (SESAC). These licensing organizations have been the subject of numerous antitrust actions and their monopolistic power remains controversial. *See generally* Stanley M. Besen, Sheila N. Kirby and Steven C. Salop, *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383 (1992); Jay M. Fujitani, Comment, *Controlling the Market Power of Performing Rights Societies: An Administrative Substitute for Antitrust Regulation*, 72 CALIF. L. REV. 103 (1984); George L. Burns, *Judicial Decisions Involving ASCAP*, 37 A.L.R.6TH 243 (2008).

[28] The music administrator, which handles the licensing of the work, is not the same as the music publisher, which owns the copyright for the music and handles most other business decisions for the band. For information about the distinction between "LicensingCorp" and "MusicCorp," see note 46. If Alice were quoting a more obscure band than the Beatfellas, she would likely have a more difficult time determining who she should contact for permission.

[29] *See infra* note 31.

[30] It is worth emphasizing that any music the reader "hears" from reading Alice's prose results from the reader's preexisting familiarity with the song and independent imaginative process. That is, Alice is incorporating the Beatfellas' song into her historical fiction by way of mental reference rather than musical adaptation. Such a use does not fit into the ordinary music licensing scheme. *See infra* note 31.

Instead she finds horror stories of authors who have attempted to independently negotiate with songwriters and composers to purchase licenses to quote.[32] As something of a starving artist, Alice cannot afford to pay these expensive permission fees. Furthermore, her publisher, IndiePress, will not pay for expenses above and beyond the cost of printing and distributing the book.[33] Alice researches her other options, and finds that it is sometimes acceptable to *parody* a copyright owner's work without reproducing it directly.[34] Thinking about the parody option, Alice briefly considers changing the Beatfellas to "the Rhythmbuddies" and humorously modifying the quoted lyric to comment on the Beatfellas' catchy music. She quickly decides, however, that this change does not fit in with her artistic ambitions for the novel—the humorous intervention would undermine the drama of her climactic scene and threaten to disrupt the reader's suspension of disbelief.[35]

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[31] Because the nature of Alice's use is not musical in the ordinary sense, the license does not fit into the traditional classifications. BMI, a leading music licensing company, provides information on four main types of musical licenses: Public Performance Licenses – granting the right to perform or transmit the song in public; Mechanical Licenses – granting the right to reproduce the song in a recording at an agreed upon fee per unit manufactured; Synchronization Licenses – granting the right to synchronize the song in timed relation with audio-visual images on film or videotape; and Digital Performance Licenses – granting the right to stream the song digitally over the internet. *Types of Copyright,* BROADCAST MUSIC, INC. (BMI), http://www.bmi.com/newmedia/entry/533606 (last visited January 15, 2012). None of these traditional licenses reflects the peculiar character of Alice's use, which is referential rather than auditory. *See supra* note 30.

[32] For example, to receive permission to quote a single line of "Wonderwall" by Oasis, author Blake Morrison had to pay £535 to a licensing company. Blake Morrison, *Blake Morrison on the Cost of Quoting Song Lyrics*, THE GUARDIAN UK, April 30, 2010, http://www.guardian.co.uk/books/2010/may/01/blake-morrison-lyrics-copyright. In total, Morrison had to pay £4,401.75 (almost $6,000 US) for quoting lines from a handful of pop songs, an amount comparable to a first-time author's average advance. *Id.* "[The fees are] an interesting illustration of the power of music publishers. Or of the scary lawyers they employ." *Id.* Understandably, many authors might find it not worth their time, money, and effort to quote song lyrics in their work.

[33] It is possible that large publishers or especially wealthy authors will pay the licensing fee for using song lyrics, even if they have a legitimate fair use claim and even if the fees cost several thousand dollars. Professor Gibson observes that fair users often request licenses simply to avoid litigation, which in turn increases the scope of the right expected by copyright holders. *See generally* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007). The misconception that licensing is required tends to limit the opportunity for this type of artistic expression to those writers and publishers with vast financial resources.

[34] The First Amendment protection for parody is well-established in copyright case law. *See* Campbell a/k/a Luke Skyywalker v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (despite its commercial character, 2 Live Crew's rap parody of Roy Orbison's popular song "Oh, Pretty Woman," may be a fair use within the meaning of section 107); *Fisher v. Dees,* 794 F.2d 432 (CA9 1986) ("When Sonny Sniffs Glue," a parody of "When Sunny Gets Blue," is fair use); *Elsmere Music, Inc. v. National Broadcasting Co.,* 482 F.Supp. 741 SDNY), aff'd, 623 F.2d 252 (CA2 1980) ("I Love Sodom," a "Saturday Night Live" television parody of "I Love New York," is fair use). The Supreme Court has noted that "the germ of parody lies in the definition of the Greek *parodeia* [meaning] 'a song sung alongside another.'" *Campbell*, 510 U.S. at 580 (quoting 7 ENCYCLOPEDIA BRITANNICA 768 (15th ed. 1975)) (cited in *Campbell*, 972 F.2d at 1440).

[35] This high degree of established legal protection for parody provides authors an opportunity to comment or criticize the original work, but does not protect literal quotations or social commentary in the form of "satire." *See* Dr. Seuss Enterprises v. Penguin Books, .S.A., 109 F.3d 1994 (9th Cir. 1997) (holding a Dr. Seuss-style story depicting the O.J. Simpson murder trial was a satirical comment on the trial, and not a parody commenting upon the underlying work, and thus not a fair use).

As Alice researches the legal issues posed by this particular scene in her novel, she makes one positive discovery: The conventional wisdom in book publishing says that she would be allowed to use the band's name in her creative writing, even though "the Beatfellas" is a registered trademark.[36] The trademark use exception in writing[37] stems from the limited purpose of federal trademark protection—to prevent consumer confusion.[38] Alice's use would not cause consumer confusion because she is not using "the Beatfellas" as an identifying term in the course of commerce.[39] Furthermore, Alice's use of the Beatfellas' name is most likely protected by the First Amendment principles of free expression.[40] However, while the First Amendment likely saves Alice from trademark infringement liability for referencing the Beatfellas' name, the Supreme Court has held that there is no inherent conflict between free expression and copyright infringement liability.[41]

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[36] Federal registration of trademarks in the United States is governed by Trademark Act of 1946 (The Lanham Act) §1, 15 U.S.C. § 1051 ("Application for Registration"). Band names are frequently registered as trademarks which can be used to identify their products and services, i.e. individual songs, albums, concerts, and merchandise. The real-life band name "The Beatles," for example, is a registered trademark of Apple Corps. Ltd., which famously sued Apple Computer for trademark infringement and settled out of court. *See* Apple Corps Ltd. v. Apple Computer Inc., [2006] EWHC 996 (Ch). The analysis for a trademark infringement claim bears some similarity to copyright infringement claim discussed in this Article, but with more obvious statutory protections for our hypothetical author. The contrasting legal protections between the two areas of law thus provide a useful basis of comparison.

[37] Trademarks and service marks are discussed under "brand names" in the stylebook for the Associated Press: "Sometimes, however, the use of a brand name may not be essential but is acceptable because it lends an air of reality to a story: *He fished a Camel from his shirt pocket* may be preferable to the less specific cigarette." NORM GOLDSTEIN, THE ASSOCIATED PRESS STYLEBOOK AND BRIEFING ON MEDIA LAW 33 (2004).

[38] "Congress enacted the Lanham Act in 1946 in order to provide national protection for trademarks used in interstate and foreign commerce." *Park N' Fly, Inc. v. Dollar Park N' Fly*, 469 U.S. 189, 193 (1985); *see also* S.Rep. No. 1333, 79th Cong., 2d Sess., 5 (1946). The statute protects marks which are "use[d] in commerce." Lanham Act §1(a), 15 U.S.C. § 1051(a). "'Use in commerce' must be a bona fide use of the mark in the ordinary course of trade.' *Id* . at §45, 15 U.S.C. §1127 (definitions).

[39] While Alice might face trademark liability had she titled her book *A History of the Beatfellas*, her use of "the Beatfellas" in this fictional scene does not constitute the required "use in commerce" for trademark law as it is not used as an identification of her products or services "in the ordinary course of trade." *See supra* note 38.

[40] The relationship between the First Amendment and trademark law is frequently litigated, but artistic expression is generally considered protected. "The First Amendment may offer little protection for a competitor who labels its good with a confusingly similar mark, but '[t]rademark rights do not entitle the owner to quash an authorized use of the mark by another who is communicating ideas or expressing a point of view.'" Mattel v. MCA Records, 296 F.3d 894, 900 (9th Cir. 2002) (quoting L.L. Bean v. Drake Publishers, 811 F.2d 26, 29 (1st Cir. 1987)). "[T]he trademark owner does not have a right to control public discourse whenever the public imbues his mark with a meaning beyond its source-identifying function." Mattel, 296 F.3d at 900 (9th Cir. 2002) (holding that the song "Barbie Girl" did not result in trademark liability for infringing Mattel's "Barbie" because of First Amendment principles of free expression).

[41] The Supreme Court in *Eldred v. Ashcroft* emphasized that copyright protection and the First Amendment were not countervailing principles. 537 U.S. 186, 219 (2003) (upholding the constitutionality of Congress extending copyright terms); *see also* Copyright Term Extension Act (The Sonny Bono Act), 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302, 303, 304(c)(2). Justice Ginsberg, writing for the majority in *Eldred*, observed, "The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framer's view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression." 537 U.S. at 219 (2003).

In sum, Alice discovers that she can legally refer to the song's title[42] and the band's name,[43] but that, at least according to the conventional wisdom, she should *not* quote the song lyrics themselves. Unfortunately, this just does not satisfy her artistic vision; the lyric is essential to the realism and artistry of that scene! After giving it some thought, Alice decides she *must* quote the lyric, even though she cannot afford permission through LicensingCorp. She thinks it unlikely that her book would become a popular bestseller which would attract unwanted legal attention. Furthermore, Alice questions whether any party would actually have the gall to sue her and IndiePress for quoting a song lyric which is already so popular and well-known to the listening pubic.[44]

IndiePress decides not to require Alice to remove the quote[45] and the published book becomes a modest success. One reader, upon noticing the line from "Freedom Rocks," reports the offending paragraph to MusicCorp, the music publishing company which owns the copyright for the song in question.[46] MusicCorp[47] has a very aggressive

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At the same time, Ginsburg also notes the importance of copyright's "built-in First Amendment accommodations," specifically the idea/expression dichotomy and "fair use." *Id.*

[42] *See supra* note 22; *see also* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 10:4 (4th ed. 2012) ("Titles of single expressive works cannot be registered as trademarks").

[43] *See supra* note 38 and accompanying text.

[44] Unfortunately for Alice, the music industry is notorious for aggressively litigating such issues, even against comparatively small defendants such as herself and IndiePress. *See* notes 149-153 and accompanying text.

[45] In reality, it is quite likely that IndiePress *would* require Alice to remove the quote because of its fear over incurring damages for infringement, even if courts should uphold Alice's use as fair. *See* notes 140-147 and accompanying text for discussion of how the remedial scheme in American copyright law discourages authors and publishers from pursuing legitimate fair uses.

[46] Music publishers typically handle such "business" decisions as whether or not to bring suit for copyright infringement. According to the Music Publishers Association, "Music publishers play a vital role in the development of new music and in taking care of the business side, allowing composers and songwriters to concentrate on their creative work." *Frequently Asked Questions*, MUSIC PUBLISHERS ASSOCIATION, http://www.mpaonline.org.uk/FAQ (last visited Oct. 24, 2011). Typically, a band or songwriter assigns the copyright for their song to the music publishing company, and in return the publisher offers promotional services for the artist. Artists and music publishing companies typically split royalties 50-50, and legal disagreements between musicians and their publishers are extremely common. *See* Don E. Tomlinson, *Everything That Glitters Is Not Gold: Songwriter-Music Publisher Agreements and Disagreements*, 18 HASTINGS COMM/ENT L.J. 85 (1995). For discussion on the changing role of music publishers over the past few decades and in the future, see Gary Myers & George Howard, *The Future of Music: Reconfiguring Public Performance Rights*, 17 J. INTELL. PROP. L. 207 (2010); Olufunmilayo B. Arewa, Symposium, *YouTube, UGC, and Digital Music: Competing Business And Cultural Models in the Internet Age*, 104 NW. U. L. REV. 431 (2010); Neil Conley, Article, *The Future of Licensing Music Online: The Role of Collective Rights Of Organizations and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409 (2008).

[47] There are hundreds of music publishing companies in the United States, but perhaps the most well known are Sony Music Entertainment, EMI Group, Warner Music Group, and Universal Music Group, known in the industry as the "Big 4." Kurt E. Kruckeberg, Note, *Copyright "Band-Aids" and The Future of Reform*, 34 SEATTLE U. L. REV. 1545 (2011) (quoting ROGER WALLIS, THE CHANGING STRUCTURE OF THE MUSIC INDUSTRY: THREATS TO AND OPPORTUNITIES FOR CREATIVITY 294 (Steven Brown & Ulrik Volgsten eds., 2006)).

litigation department which is unsympathetic to Alice's high-minded literary ambitions. MusicCorp's lawyers sue Alice for copyright infringement.[48]

MusicCorp must prove two elements in order to succeed in their claim of copyright infringement: (1) The plaintiff's "ownership of a valid copyright" in the work; and (2) defendant's "copying of constituent elements of the work that are original."[49] In this case, MusicCorp's ownership of "Freedom Rocks" is easily proven.[50] The second element is a matter of law to be decided by the judge.

Alice's defense lawyer hopes to influence the trajectory of copyright law in a way which would potentially benefit future writers in Alice's position. Her lawyer therefore puts forward an affirmative defense of fair use against the infringement claim.

In order to answer this question of law—and decide whether Alice and IndiePress should be held liable—the judge proceeds to consider the underlying rationale and case law supporting the doctrine of fair use. The judge finds there is unfortunately very little case law governing this precise issue.[51] [52]

II. RELEVANT PRINCIPLES BEHIND THE FAIR USE DEFENSE: THE LAW AND ITS APPLICATION TO ALICE'S CASE

The constitutional authority for Congress to enact legislation on matters of intellectual property generally comes from the so-called "Copyright and Patent Clause,"[53] which states: "The Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[54] The precise nature of Congress's power in this area is contested among judges and constitutional law

[48] The Copyright Act of 1976 protects a copyright owner's right to reproduction, adaptation, distribution, performance, display, and audio transmission performance. *See generally* 17 U.S.C. § 106. MusicCorp would have to allege in the suit which of the foregoing rights have been specifically violated.

[49] Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.01 (2012).

[50] The Beatfellas themselves would probably have no say in whether or not to bring suit against Alice. Major musical groups typically assign their copyright ownership to the music publisher with whom they sign. See *supra* note 17.

[51] "There is very little caselaw on the copyright limitations of making these kinds of iterative uses of other author's works. Any society committed to promoting an abundance of authors and works of authorship must provide breathing room for iterative copying that is a necessary part of authorial work." Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2577 (2009).

[52] While there are arguably not enough cases on the subject of quoting song lyrics in fiction, there has been scholarship on the subject of quoting song lyrics in legal writing. *See* Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531 (2007) (arguing that quoting lyrics in legal briefs and opinions frequently undermines a lawyer's ability to advocate with necessary credibility).

[53] U.S. Const., Art. I, § 8, cl. 8. Otherwise known as the "Intellectual Property Clause." Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004) (discussing overlap and potential conflicts between Congress' grant of authority in the Intellectual Property Clause and the Commerce Clause).

[54] U.S. Const., Art. I, § 8, cl. 8.

scholars,[55] with much of the debate revolving around the Framers' intended meaning in selecting the words "Progress" [56] and "limited." [57] Despite contemporary questions concerning the extent of Congress's power in this area, the Copyright Clause apparently passed the Constitutional Convention without much debate or controversy.[58]

Before Congress chose to codify "fair use" in the Copyright Act of 1976,[59] it existed as a judicially created doctrine.[60] The Supreme Court in *Stewart v. Abend*[61] described the rationale for fair use protection as to "permit courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[62] Indeed, the Supreme Court has held that "some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts,"[63] a constitutional objective.

The Copyright Act of 1976 codified the common law doctrine of fair use in 17 U.S.C. § 107. In the preamble, the statute states that such fair uses may "includ[e]" purposes "such as criticism, comment, news reporting, teaching [...], scholarship, or research"[6465] but the statutory words "including" and "such as" have been held to mean that such uses are *not* an exhaustive list of which uses are to be considered fair.[66]

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[55] A common mistake is to misapply contemporary understandings of the words "science" and "useful arts," rather than their 18th century meanings. Ralph Oman, *The Copyright Clause: "A Charter for a Living People,"* 17 U. BALT. L. REV. 99, 104 (1987-1988).

[56] Ralph Oman, *The Copyright Clause: "A Charter for a Living People,"* 17 U. BALT. L. REV. 99, 104 (1987-1988) ("The introductory phrase 'to promote the progress of Science and useful arts,' is mainly explanatory of the purpose of copyright. It suggests, at most, certain minimal elements to be contained in copyright legislation."); *Cf.* Dotan Oliar, *Making Sense of The Intellectual Property Clause: Promotion of Progress as A Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1810 (2006) (arguing that the "Progress Clause" was not meant as merely explanatory, but as a limitation on the powers of Congress in this area).

[57] In his dissenting opinion in *Eldred v. Ashcroft*, Justice Stevens emphasized the importance of the word "limited" in the Copyright Clause, noting "The Copyright Clause benefits the public in part because it 'admit[s] the people at large, after a *short* interval, to the full possession and enjoyment of all writings . . . without restraint." 537 U.S. 186, 261 (2003) (quoting CF. J. STORY, COMMENTARIES ON THE CONSTITUTION § 558, p. 402 (R. Rotunda and J. Nowak eds. 1987) (words italicized in dissenting opinion). The majority in *Eldred* disagreed, finding "the word 'limited' [. . .] does not convey a meaning so restricted." 537 U.S. at 187 (2003). The Copyright Term Extension Act's protection of copyright for the life of the author plus 70 years was nonetheless limited because it was "confined within certain bounds, restrained, circumscribed."

[58] Karl Fanning, *The Origin of the Patent and Copyright Clause of the Constitution,* 17 GEO. L.J. 109, 114 (1929).

[59] 17 U.S.C. § 101 et. seq (2000).

[60] For an authoritative distillation of the history of the fair use doctrine in the United States, see Justice Souter's majority opinion in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574-78 (1994). Souter finds the four fair use factors found in § 107 of the Copyright Act of 1976 to be implicit in Justice Story's opinion over 150 years previously. Folsom v. Marsh, 9 F.Cas. 342 (No. 4,901) (CCD Mass. 1841). 495 U.S. 207, 236 (1990) (cited in Campbell, 510 U.S. 569, 577 (1994))

[61] 495 U.S. 207, 236 (1990) (cited in Campbell, 510 U.S. 569, 577 (1994)).

[62] *Id.* The fair use goal of protecting, and encouraging, creativity is, of course, extremely relevant to authors in Alice's situation.

[63] Campbell, 510 U.S. 569, 577 (1994). Justice Souter is quoting U.S. Const., Art. I, § 8, cl. 8, the "Copyright and Patent Clause."

[64] 17 U.S.C. § 107 (2000).

To decide whether a party such as Alice's activity is a fair use, even if it is otherwise infringing, 17 U.S.C. § 107 sets forth four factors for the courts to consider:

> "(1) the purpose and character of the use [. . .]
> "(2) the nature of the copyrighted work;
> "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> "(4) the effect of the use upon the potential market for or value of the copyrighted work [. . .]"[67]

The Supreme Court has emphasized that the four fair use factors are not to be treated as separate pieces in the analysis, noting "[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright."[68] The Supreme Court has advised not to weigh the factors "in isolation, one from the other."[69] Ironically given this warning, both the Court itself[70] and various Courts of Appeals[71] have nevertheless analyzed the four factors separately in their analysis. In light of this and for organizational reasons, this Article examines Alice Author's affirmative defense of fair use in similar fashion.

A. Purpose and Character of the Use

The central purpose of the first factor of the fair use analysis is to determine whether the use is merely "supplanting" the original,[72] or whether it "instead adds something new, with a further purpose or different character."[73] Courts inquire into

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[65] How narrowly are courts to interpret "educational" fair use under §107? The legislative history of The Copyright Act of 1976 suggests that educational use protection was primarily concerned with traditional classroom use, emphasizing the "need for greater certainty and protection for teachers." H.R. REP. NO. 94-1476, at 66-67 (1976). But should courts consider the extent to which copyrighted materials are being used for educational purposes outside the classroom? *See* Evans C. Anyanwu, Note and Comment, *Let's Keep It On The Download*: *Why the Educational Use Factor of the Fair Use Exception Should Shield Rap Musicians From Infringement Claims*, 30 RUTGERS COMPUTER & TECH. L.J. 179, 186-87 (2004) ("African Americans, as a disadvantaged group, depend on rap music more than any other ethnic group depends on a single genre of music. Rap music [. . .] 'is the CNN of the Ghetto.' This music genre is mainly social commentary providing the world with a useful and artistic depiction of life in the Black community. Rap's informative and educational value should [. . .] deem most of the genre's use of copyrighted work fair use.") (including quotation from Larry Platt, *Allen Iverson's Bum Rap, at* http:// www.sportsjones.com/sj/ijo.shtml (last visited Nov. 21, 2003) (on file with the Rutgers Computer and Technology Law Journal)).

[66] "The text [of § 107] employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the examples given." Campbell, 510 U.S. 569, 577 (1994).

[67] 17 U.S.C. § 107 (2000).

[68] Campbell, 510 U.S. 569, 578 (1994). A few paragraphs later, the Court reiterates that the express goal of copyright is "to promote science and the arts." *Id.* at 579.

[69] Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 578 (1994).

[70] Justice Souter, writing for the majority, analyzes the four factors in sections A through D. *Id.*

[71] *See, e.g.*, Wright v. Warner Books, Inc., 953 F.2d 731, 736 (2d Cir. 1991) (examining the factors under subheadings "1," "2," etc.); A.V. ex rel Vanderhye v. iParadigms, 562 F.3d 630 (4th Cir. 2009) (analyzing the factors as "First Factor," "Second Factor," etc.); Perfect 10 v. Amazon, 508 F.3d 1146, 1164 (9th Cir. 2009) (judging the factors under four italicized subheadings).

[72] Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 562 (U.S. 1985).

[73] Campbell, 510 U.S. at 579 (1994).

whether the use is transformative, "altering the [original material] with new expression, meaning, or message."[74] The Court has been careful to note that a transformative quality is not absolutely necessary to establish the fair use defense, but it is highly helpful to defendants in these cases.[75]

The trial court in Alice's case might question whether quoting the Beatfellas' lyrics is transformative, given the fact that she is quoting them directly. The Supreme Court in *Campbell v. Acuff-Rose Music*[76] suggests that alteration via parody pushes the first factor heavily in favor of the user.[77] But even in the absence of parody, a use can still be transformative if the user shifts the original work into a new artistic context,[78] or even a similar artistic context.[79] Here, where a fiction author transforms the original Beatfellas song from an audio recording (i.e. material which is heard with the ears) into prose fiction (i.e. material which is read, in most cases with the eyes)[80] using an imaginary setting fashioned by the author's own creativity, such an artistic adaptation should be found, by its very nature, transformative.

The court might struggle in weighing the "purpose and character" of the use because of the commercial nature of Alice's book,[81] keeping in mind that her novel is presumably being sold by IndiePress for a profit in excess of the cost of printing. The examples which Section 107 lists as possible examples of fair use are primarily non-commercial uses—teaching, scholarship, research—or uses which may be considered commercial, but nonetheless provide a clear public benefit—news reporting, criticism,

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[74] *Id.*
[75] *Id.* at 579.
[76] *Id.*
[77] "Suffice it to say now that parody has an obvious claim to transformative value, as Acuff-Rose itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one." *Id.* Justice Souter might well be describing a use like Alice's, which is not intended to be humorous.
[78] While parody is a frequent occurrence in these cases, it is not a requirement of transformative fair use. *See, e.g.*, Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006) (holding fair use for a visual artist to use photos from a popular magazine to create a digital painting collage).
[79] A fiction author's retelling of the novel *Gone With the Wind* from the perspective of a slave in *The Wind Done Gone* constitutes a fair use, even though the new novel appropriated characters, plot, major scenes, and verbatim dialogue from the earlier book. Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257, 1264 (11th Cir. 2001). Even though both works were novels, *The Wind Done Gone* was transformative because the author retold the original story from a different perspective. *Id.* at 1269. *See* Gaylord v. United States, 595 F.3d 1364, 1373 (Fed. Cir. 2010) (finding that the use of a sculpture of soldiers as a photographic image on a postal stamp is not transformative because both pieces of art had the "common purpose" of venerating veterans).
[80] If Alice Author's novel were adapted into an audio book, the publisher might have the narrator sing the quoted Beatfellas lyrics. Because such a use would have more in common with an auditory performance than normal reading, MusicCorp might have a stronger claim in requiring the publisher to purchase a song license. But again, the license would be for a *performance* of the song, and not for the mere reproduction of the lyrics in Alice's writing. See *supra* note 23 for discussion of the distinct copyright protections.
[81] Should it matter if Alice's motivations in writing the book are not primarily commercial? For an argument that fair use should usually be protected regardless of commercial motives, but simply as an extension of First Amendment principles of free expression, see Jen Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 16-21 (2002).

comment. [82] Professor Samuelson has noted that prior to the Supreme Court's holding in *Campbell*, courts placed more weight on the commercial character of the use.[83] But the Court's holding in *Campbell* on this subject is more explicit, holding courts should not "elevat[e] commerciality to hard presumptive significance."[84] While the Court recognized that commerciality could in certain applications[85] weigh against the user, it is not a bar to fair use, and should not adversely impact Alice's fair use defense.

Ultimately, *Campbell*'s analysis of the first factor is primarily guided by the court's emphasis on transformation, with the court reiterating that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[86] Because a use such as Alice's at the very least provides a brand new context to the Beatfellas' lyrics,[87] the trial court should find in favor of our author on the first factor. [88]

B. Nature of the Copyrighted Work

The Court has held that the second statutory factor, the "nature of the copyrighted work,"[89] "calls for recognition that some works are closer to the core of intended copyright protection than others."[90] Generally, creative works – such as songs – are entitled to more copyright protection than factual works. [91] The courts have also recognized that original creative works are afforded greater protection than derivative works.[92] On the other hand, the fact that a work has already been published would tend to

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[82] 17 U.S.C. § 107 (2000).
[83] Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2550 n. 64 (2009). Before *Campbell*, the Supreme Court had stated, "The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 562 (U.S. 1985).
[84] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 (1994).
[85] "The use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence [. . . .]" *Id.* Alice's use, obviously, is not an advertisement for a competing product which would weigh against her affirmative defense.
[86] Campbell, 510 U.S. at 578 (1994).
[87] In our application of the fair use law, we should not neglect to examine the nature of the artistic process itself. Professor Cohen has argued that fair use law must recognize that artists are fundamentally *shaped* by the creative context in which they live, and that prohibitions on transformative fair use fail to recognize the role of the environment in the creative process. Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 364 (2005-2006). In a case like Alice Author's the creative environment has influenced both her: (1) artistic preference for wanting to quote the song, and (2) her belief that this is a song her characters must hear in the story.
[88] Professor Netanel has summarized the transformation inquiry under the first factor as follows: "If the use is transformative, and the user has not copied excessively in light of the transformative purpose, the use will most likely be held to be a fair use." Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 768 (2011).
[89] 17 U.S.C. § 107(2) (2000).
[90] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).
[91] New Era Publications v. Carol Publishing Group, 904 F.2d 152, 157 (2d Cir. 1990) ("Furthermore, the scope of fair use is greater with respect to factual than non-factual works.")
[92] Campbell, 510 U.S. at 586; Warren Pub. v. Microdos Data Corp., 115 F.3d 1509, 1515 n. 16 (11th Cir. 1997); Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257, 1271 (11th Cir. 2001).

weigh in favor of a finding of fair use,[93] and in this case, the Beatfellas' music has already been widely disseminated. In cases of parody, courts have tended to quickly dispose of this factor as not being very helpful to the analysis, "since parodies almost always copy publicly known, expressive works."[94] Alice's situation falls under this same category of using highly well-known material for a transformative purpose; thus, as in many transformative use cases, the second factor will probably not be decisive to finding for either party.[95]

C. Amount and Substantiality of Work Used

The third fair use factor asks whether "'the quantity and value of the materials used' are reasonable in relation to the purpose of the copying."[96] This inquiry requires an assessment "not only into the quantity of the materials used, but about their quality and importance."[97] In examining whether an excerpt of a soon-to-be-released book was fair use, the Supreme Court stated that the third factor asked whether the secondary use went to "the heart"[98] of the quoted work.

Even accepting that the average pop song is relatively short in length,[99] Alice's use of a single line consisting of seven words does not seem like it is copying a "substantial" amount of the Beatfellas' song.[100] The second factor only examines the proportion of the original copyrighted work which has been copied, although the proportion of Alice's novel which constitutes infringing use is of course very small.[101] Importantly, copyright law also recognizes a *de minimis* use defense where the alleged infringer demonstrates that "the copying of the protected material is so trivial 'as to fall

[93] "Published works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred." Kelly v. Arriba Soft, 336 F.3d 811 (9th Cir. 2002); *see also* New Era Publications, 904 F.2d at 157 (citing Harper & Row v. Nations Enterprises, 471 U.S. 539, 562 (U.S. 1985)).
[94] Campbell, 510 U.S. at 586 (cited in Warren, 115 F.3d at 1515).
[95] Transformative use generally limits the relevancy of the second fair use factor. "[T]he second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose." Bill Graham Archives v. Dorling Kindersley, 448 F.3d 605 (2d Cir. 2006).
[96] 17 U.S.C. § 107(3) (2000).
[97] Campbell, 510 U.S. at 867.
[98] Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 564 (1985).
[99] The average length for popular songs listed in the Billboard 100 for 2010-2011 was four minutes, 26 seconds. *Overall Visualizations*, THE BILLBOARD EXPERIMENT, http://www.thebillboardexperiment.com/overall.php (last visited January 15, 2012). For the 2000s, it was 4:10; for the 1990s, it was 4:14. *Id.*
[100] If substantially duplicating the plot, characters, scenes, and dialogue of a novel is protected by transformative fair use (*see* Suntrust, 268 F.3d at 1271), then we might intuitively think that Alice's far more limited use of seven words should also be protected.
[101] The minimal length requirement for a novel is usually considered 40,000 words, but most contemporary novels fall within the range of 100,000 to 175,000 words. JANE SMILEY, THIRTEEN WAYS OF LOOKING AT A NOVEL 14 (2005). If Alice's novel falls in the middle of this average range, and MusicCorp's infringement claim revolves around her using seven words of a Beatfellas' song, then their entire action against her is based on 0.000051% of the novel's text. While this is not the proportion that the courts are instructed to examine in §107(3), this seems to be the ratio that the majority finds to weigh against fair use in Harper. 471 U.S. at 548 ("[T]he direct takings from the unpublished manuscript constitute at least 13% of the infringing article.")

below the quantitative threshold of substantial similarity [between the two works].'"[102] But the lyrics at issue do come from the chorus—the most familiar part of the melody. Does this necessarily mean that Alice is copying "the heart"[103] of the song?

In answering this question, we should consider the Supreme Court's specific use of the phrase, "the heart," in their analysis. In *Harper & Row*,[104] the Court found that *The Nation*'s publication of an excerpt of 300 words from President Ford's memoirs did not constitute fair use.[105] This excerpt went to "the heart" of the quoted book because it revealed why Ford had pardoned President Nixon.[106] While the Court said that the defendant failed because of the second factor, the real objection to this being fair use seems to be that now that this secret information is revealed, the market value for the work has substantially diminished,[107] which is actually the fourth factor in the analysis.[108] As discussed below, Alice's use might very well *increase* the marketability of the Beatfellas' song,[109] so the concern about her quoting "the heart" of the song should not have the same degree of importance to the trial court.

The issue in the instant case also differs from the classic case of musical sampling.[110] Consider the example posed by a law student:

> If a rapper samples three seconds of the Aretha Franklin's song, *Respect (R.E.S.P.E.C.T)*, and repeated it throughout another song, the court may likely find that the taking was quantitatively insignificant. [Assuming those seconds were not recognizable to the average listener.] However, if the taking was of the portion of the track that says "*Just a little bit*," or "*respect,*" this taking would be quantitatively significant, especially because it is the heart of the song. Consequently, the *de minimis* infringement defense would not be successful.[111]

In Alice's situation, it is worth reiterating that her use represents a clear change in form. A court might find substantial copying when a musician lifts an entire musical

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[102] Sandoval v. New Line Cinema Corp, 147 F.3d 215 (2d Cir. 1998) (quoting Ringgold v. Black Entertainment Television, Inc. 126 F.3d 70 (2d Cir. 1997) (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.03[A] at 13-27)).
[103] Harper, 471 U.S. at 564.
[104] *Id.*.
[105] Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 564 (1985).
[106] *Id.*
[107] "Fair use 'distinguishes between 'a true scholar and a chiseler who infringes a work for personal profit.'"" *Id.* at 539, citing Wainwright Securities v. Wall Street Transcript, 558 F.2d 91, 94, quoting from Hearings on Bills for the General Revision of the Copyright Law before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 8, pt. 3, p. 1706 (1966) (statement of John Schulman).
[108] Once again, Justice Souter's advice not to treat the four factors in complete isolation seems especially appropriate. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).
[109] *See* text accompanying notes 127-137.
[110] Although there is a popular misconception that song clips of up to 30 seconds are permissible, no such exception exists. *New Media FAQ,* BROADCAST MUSIC, INC. (BMI), http://www.bmi.com/newmedia/entry/533605 (last visited January 15, 2012).
[111] Evans C. Anyanwu, Note and Comment, *Let's Keep It On The Download*: *Why the Educational Use Factor of the Fair Use Exception Should Shield Rap Musicians From Infringement Claims*, 30 RUTGERS COMPUTER & TECH. L.J. 179, 190-91 (2004) (lyrical quotation from ARETHA FRANKLIN, *Respect (R.E.S.P.E.C.T.)*, *on I Never Loved a Man the Way I Loved You* (Atlantic Records 1967).

phrase from Song A to Song B,[112] but can any author really steal "the heart" of *a song* when they transfer it from the medium of music to the medium of prose fiction (i.e. from Song A to Novel A)?

Because Alice's type of use is so limited, and does not even take advantage of the same mode of artistic expression, the court should find the third factor to weigh heavily in Alison's favor.

D. Effect of the Use on the Market Value of the Original

The fourth statutory factor for a finding of fair use is the "effect of the use upon the potential market for or the value of the copyrighted work."[113] Courts are specifically instructed not to presume diminished marketability of the original simply because the second work is commercial.[114] Generally, when there is no market harm to the original work, the affirmative defense of fair use must be accepted.[115] From 1985 to 1994, the Court held that fourth factor is "undoubtedly the single most important element of fair use."[116] In *Campbell*, the Court backed off this emphasis slightly,[117] but scholars examining the treatment of fair use cases since 1994 have found that courts generally still hold the fourth factor to be the most decisive.[118]

MusicCorp might argue that there is a potential market for licensing song lyrics to fiction authors precisely in Alice's position,[119] and even put forth evidence that this market for licenses has been created.[120] As noted earlier, there is currently no established

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[112] Although this might not always found to be an infringement, either, as musicians might still be protected under the theory of transformative fair use. "[Musical] [r]emixes and mashups recontextualize parts of existing works, thereby shedding light on and contributing new insights about the original." Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2555 (2009).

[113] 17 U.S.C. § 107(4).

[114] Harper & Row v. Nation Enterprises, 471 U.S. 539, 591 (1985).

[115] Triangle Publications, Inc. v. Knight-Ridder Newspapers, 626 F.2d 1171, 1178 (5th Cir. 1980) (holding where the market harm was *de minimis*, the use was fair).

[116] Harper & Row v. Nation Enterprises, 471 U.S. at 561.

[117] "Market harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors." Campbell, 510 U.S. at 590, n. 21.

[118] *See e.g.*, Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 777 (2003) ("[T]here is still much to commend the fourth factor as first among equals."); Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. Copyright Soc'y U.S. 1, 13 (1997) ("Fair use analysis [. . .] tends to concentrate on the potential market impact of the copying.") Professor McManis proposes that the reason the fourth factor is the most determinative is because "the fourth factor is implicit in the other three." CHARLES R. MCMANIS, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION IN A NUTSHELL 327 (6th ed. 2009).

[119] In considering secondary derivative markets, we might ask whether it should matter whether the copyright owner would have been willing to sell a license to the user had they solicited one. But if the use is transformative, the use will generally be held to be fair, *even if* "the copyright holder in principle would have been willing to license the use in question." Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 768 (2011). However, MusicCorp could attempt to *create* a stable market for licensing song lyrical quotations. *See infra* note 120.

[120] *See* American Geophysical Union v. Texaco, 60 F.3d 913, 931 (2d Cir. 1994) ("Whatever the situation may have been previously, before the development of a market for institutional users to obtain licenses . . . it is now appropriate to consider the loss of licensing revenues in evaluating [the fourth factor]"). However,

licensing company for using song lyrics in fiction, unlike the companies which sell public performance rights for music.[121] However, authors and publishers have sometimes been able to individually negotiate permissions with the lyricists themselves.[122] While this is an infrequent occurrence, it is reasonable to assume that fiction authors who considered themselves fair users would no longer seek out such licenses.

But the Supreme Court has held that the transformative nature of the use is still relevant to the marketability analysis. The Court begins its fourth factor analysis in *Campbell* by recognizing that when "the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred."[123] Unlike the musician who buys a public performance license from BMI or ASCAP to cover an original song, Alice's use of the song in fiction is transformative. Under the Court's reasoning, this transformative quality diminishes the likelihood that she is harming the marketability of the original.

Looking further to the evidence supporting Alice's defense, it seems highly unlikely that Alice's song quotation would hurt the marketability of the Beatfellas' copyrighted work. In deciding on the fourth factor, the courts look to whether there was "market substitution" between the original and secondary works.[124] When the original and secondary creative works do not necessarily appeal to the same market,[125] the courts are generally more favorable to the fair use defense.[126]

More importantly, there is a strong possibility that Alice's song quotation in her fiction might *increase* the market value of the Beatfellas' original song. Popular television shows such as *Glee* demonstrate that the reintroduction of classic songs into a new dramatic setting can dramatically increase the marketability of the original work.[127]

American Geophysical was a case involving unauthorized photocopying of journal articles, i.e. not a transformative use.

[121] *See supra* notes 27-32 and accompanying text.

[122] *See, e.g.* note 32.

[123] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).

[124] *Id.* at 590.

[125] The Eleventh Circuit recognized that *Gone With the Wind* and *The Wind Done Gone* appealed to sufficiently different commercial markets, and that *TWDG* was not a "market substitute" for the romance and nostalgia of the original novel. Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257, 1275 (11th Cir. 2001).

[126] Should courts consider only the harm which would be inflicted to the market at the particular time of the original work's release? For an argument that the fourth factor of market harm should take this into account, and that most courts are already doing some distince-in-time analysis in their decisions, see Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003). Obviously, this sort of distance-in-time analysis would further push the fourth factor in Alice's direction.

[127] Music journalists have called such a phenomenon the "Glee Effect." "After Neil Diamond's "Sweet Caroline" was featured in one episode, sales of Diamond's original 1969 recording tripled. When Rihanna offered the show's producers her "Take a Bow" at a deeply discounted licensing fee, she was rewarded with a nearly 200 percent increase in sales of the song. The Rolling Stones, Billy Joel, Amy Winehouse, Olivia Newton-John and at least a dozen others have experienced similar sales surges. The biggest winner has been Journey, whose "Don't Stop Believin'" has eclipsed its original popularity since its adoption as *Glee*'s unofficial theme song. Artists and songwriters are now clamoring to get their tunes featured on

It seems highly probable that Alice's quotation of song lyrics released forty years previously would increase the level of interest in the original song. Furthermore, because Alice is quoting the song lyrics in order to avoid the tort of misappropriation,[128] the acknowledgements page at the back of the book will quickly and easily direct the readers to the Beatfellas' track.[129]

MusicCorp might also put forward the argument that Alice's use would not necessarily damage the marketability of the original song, but might damage the marketability of any derivative works,[130] such as the proposed new video game *Guitar Rock: The Beatfellas*. The Court held in *Campbell* that courts examining a fair use defense must take into account both the harm to the original and the market harm to any derivative works.[131] In the same case, the Court reiterated that "[t]he only harm to derivatives that need concern us [. . .] is the harm of market substitution."[132] Applying this standard to *The Wind Done Gone*, the Eleventh Circuit held that the fourth factor weighed heavily in favor of the defendant because the publication of the second book did not supplant the market for *Gone With the Wind* derivatives such as film sequels, musicals, etc.[133] The same analysis should protect Alice in the instant case: Her literary work does not serve as a market substitute for derivatives of "Freedom Rocks" by the Beatfellas. Although doing so might improve national literacy levels, consumers will not be actually be substituting Alice's novel for the Beatfellas' video game[134] featuring guitar-shaped controllers.

A final argument that MusicCorp might advance on the claim of copyright infringement is that, if uses like Alice's became common among writers, there might be an adverse affect on the marketability of the original. The Court recognized the force of the "widespread conduct" argument in *Campbell* as a valid consideration as part of the fourth factor.[135] But, as the Eleventh Circuit made clear in *Suntrust*, the argument that a secondary work will harm the market value of the original's derivatives is less persuasive if the secondary work is a legitimately transformative use.[136] Furthermore, the "Glee

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the show." Christopher Loudon, *The Glee Effect*, JAZZ TIMES (Sept. 16, 2010), http://jazztimes.com/articles/26514-the-glee-effect.

[128] *See supra* note 23.

[129] The citation in Alice's book would arguably make it easier for readers to purchase the Beatfellas' song than would hearing the song in real-life, as the citation clearly identifies the song's title, year of release, and songwriters, the relevant information required to purchase a physical album or search for the song from a digital distributor.

[130] A copyright owner's right to exercise control over derivative works is also protected by the Copyright Act of 1976. 17 U.S.C. § 106(2).

[131] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994); Harper & Row v. Nation Enterprises, 471 U.S. 539, 569 (1985).

[132] Campbell, 510 U.S. at 593.

[133] Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257, 1275 (11th Cir. 2001).

[134] *Compare* THE BEATLES: ROCK BAND, *dev'd Harmonix/PI Studios* (MTV Games 2009).

[135] Campbell, 510 U.S. at 590.

[136] "Suntrust argued that 'incalculable millions of dollars [were] riding on the appropriate cultivation of the [*GWTW*] franchise,' but [the Eleventh circuit said] it has failed to show, at least at this early juncture in the case, how the publication of *TWDG,* a work that may have little to no appeal to the fans of *GWTW* who comprise the logical market for its authorized derivative works, will cause it irreparable injury." Suntrust, 268 F.3d at 1276.

effect"[137] argument remains; it is possible that the widespread quoting of Beatfellas' lyrics by other fiction authors will lead to increased sales of the original song.

Recognizing that Alice's use would not, on balance, have a negative impact on the market value of either the Beatfellas' song or its derivatives—and that it might very likely *increase* the marketability of the original song in particular—the court in the hypothetical case should find the fourth factor to weigh heavily in Alice's favor.

III. WHY THE STATUS QUO?

Using the reasoning applied above, and examining the relevant case law on this issue, this Article proposes that the court should find the first, the third, and the fourth factors to weigh in Alice's favor. The second factor, the nature of the copyrighted work, has repeatedly been dismissed by the courts as being largely irrelevant to the analysis when the original work is widely published and well-known,[138] as is clearly the case with any song by the Beatfellas.

Thus, in weighing these factors, the court should find that Alice's copying is protected by the affirmative defense of fair use. Why is it, then, that the current publishing authorities are so averse to the practice of quoting song lyrics without first obtaining licensure?

First, there exists an understandable fear of incurring expensive damages should the court find the publisher liable for copyright infringement. The Copyright Act of 1976[139] provides a wide range of remedial options to the prevailing copyright owner in an infringement action. If Alice and IndiePress *were* to be found liable for copyright infringement then the court could order several remedies: The court could grant a preliminary injunction ordering that Alice's novel not be published or enjoining further publication.[140] The court could order compensatory damages paid to MusicCorp based on its finding of any commercial injury to the original Beatfellas' song.[141] In addition, the court could order IndiePress and Alice to disgorge any profits earned by sales of the novel.[142] Less traditional remedies might also be available to LicensingCorp in an action for copyright infringement, including the destruction of all copies of Alice's novel[143] and, arguably, the destruction of the printing press that manufactured Alice's novel.[144] Even if the court finds that LicensingCorp and the Beatfellas suffered no harm whatsoever because of Alice's use, the Copyright Act[145] permits courts to award "statutory

[137] See *supra* note 77.
[138] See *supra* note 57.
[139] 17 U.S.C. § 101-810 (2000).
[140] *See* 17 U.S.C. § 502 (2000) (injunctions).
[141] *See* 17 U.S.C. § 504(a)-(b) (2000) (actual damages).
[142] *See* 17 U.S.C. § 504(a)(1) (2000) ("The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing actual damages.")
[143] *See* 17 U.S.C. § 503(b) (destruction of infringing articles).
[144] *Id.* (authorizing the destruction not only of the infringing work but all "other articles by means of which such copies . . . may be reproduced").
[145] 17 U.S.C. § 101-1101 (2000).

damages"[146] to the copyright owner. Given the current remedial scheme for copyright infringement in the United States, it is easy to see how the prospect of costly damages intimidate small publishers[147] from taking a perceived "chance" with fair use, even if an author's use in these circumstances would in fact already be protected by statutory fair use.[148]

Second, the book publishing industry's general phobia of testing fair use in such cases is heightened by the music industry's reputation for aggressively bringing claims of copyright infringement, and channeling great resources into fighting all fair use defenses. In *Leadsinger v. BMG Music Pub.*,[149] the music publisher successfully argued that showing song lyrics on television screens in karaoke bars was not fair use.[150] As a result of such holdings, music publishers like BMG have won multi-million dollar settlements for damages.[151]

Music publishers insist on licensure even where the music in question is arguably a public good. Applying the constant threat of expensive litigation, Warner Music Group is able to collect $5000 per day in royalties for the simple song "Happy Birthday To You,"[152] despite strong legal arguments that the song has become a public commodity.[153]

A third reason publishing experts continually warn writers not to quote song lyrics in their work is because of the legal reality of fair use being an affirmative defense.[154] In *Campbell*, the Court recognized that because fair use was an affirmative defense, it was the defendant's burden to put forward evidence related to the factors, specifically evidence relating to the market harm to the original work.[155] While Alice has been admirably thorough in her legal research, most writers probably do not know what an

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[146] 17 U.S.C. §504(c) (statutory damages).

[147] "These [copyright infringement] remedies—disgorgement and destruction—differ from more traditional compensatory remedies in that their focus is on the defendant's gain rather than on the plaintiff's loss. As a result of this focus on gains, the disgorgement remedy is as favored among copyright plaintiff's as it is feared among defendants." Dane S. Ciolino, *Reconsidering Restitution in Copyright*, 48 EMORY L. J. 1, 3 1999. Professor Ciolino argues that since the basis of damages for infringement is the principle of "unjust enrichment," these remedies are in fact restitutionary in nature. *Id.* at 4.

[148] 17 U.S.C. § 101-1101 (2000).

[149] 512 F.3d 522, 522 (9th Cir. 2008).

[150] For more information on the possible application of fair use law to karaoke licensing, *see* Howell O'Rear, *Pay Me My (Licensing) Money Down: Legal and Practical Aspects of Karaoke Licensing*, 6 VA. SPORTS & ENT. L. J. 361 (2007). Karaoke, unlike Alice's use, is unquestionably not "transformative." *Id.* at 379.

[151] Susan Butler, *The Publisher's Place: The Karaoke Blues*, AMERICAN ARTIST, June 4, 2005.

[152] Robert Brauneis, *Copyright and The World's Most Popular Song*, 56 J. COPYRIGHT SOC'Y U.S.A. 335, 426 (2009).

[153] *Id.* at 420-23.

[154] For additional discussion about the legal realities of fair use being an affirmative defense, see Kenneth D. Crews, *Fair Use of Unpublished Work: Burdens of Proof and the Integrity of Copyright*, 32 ARIZ. ST. L.J. 1 (1999).

[155] "Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

affirmative defense means, much less how to succeed with one in litigation. This presents a significant legal challenge which they might opt to avoid altogether.[156]

IV. THE SOLUTION FOR AUTHORS SUCH AS ALICE

It is possible that Congress will enact a new section of the Copyright Act which will further specify the exact limits of fair use.[157] However, an express statutory solution to Alice's fair use problem seems unlikely, particularly considering that the doctrine of transformative use is a relatively recent innovation.[158]

With little hope of a statutory solution, what else are fiction authors such as Alice supposed to do, particularly if they themselves or their publishing presses are unable to obtain permission or purchase an expensive license?

Writers in Alice's position should proceed with quoting. That is, writers should carefully and strategically quote song lyrics in their work, keeping in mind the four fair use factors of Section 107.[159] Of course, this is potentially opening the writers and their publishers to liability for copyright infringement. But as we saw in Alice's case, a short lyrical snippet by a well-known band, transformed into a new mode of expression (prose fiction), and quoted with proper accreditation to the original songwriters, *should* be held to be a fair use according to the factors. That is, the copyright statute itself supports Alice's use.

The problem, of course, is the pervasive fear of experimentation. Traditional publishers are understandably disinclined to "guess and test" whether their publications

[156] This significant legal burden likely creates a chilling effect in opposition to the principles of free expression guaranteed by the First Amendment. *See* Jen Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 16-21 (2002). After applying the four factors to *The Wind Done Gone*, and finding for the defendant, the Eleventh Circuit said "[we would] stress that the public interest is always served in promoting First Amendment values and in preserving the public domain from encroachment." Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257, 1276 (11th Cir. 2001).

[157] Congress has modified the Copyright Act of 1976 on several occasions. *See generally*, P.L. 96-517 (Dec. 12, 1980) (defining the scope of copyright protection for computer programs); the Berne Convention Implementation Act of 1988; in 1990—the Architectural Works Copyright Protection Act, the Visual Artists Rights Act, the Computer Software Rental Amendments Act, and the Copyright Remedy Clarification Act; the Audio Home Recording Act of 1992; the Uruguay Round Agreements Act of 1994; the Sonny Bono Copyright Term Extension Act of 1998; the Digital Millennium Copyright Act of 1998; the Fairness in Music Licensing Act of 1998; the Satellite Home Viewer Improvement Act of 1999; the Technology, Education, and Copyright Harmonization (TEACH) Act of 2002; the Small Webcaster Settlement Act of 2004; the Copyright Royalty Act of 2004; the Satellite Home Viewer Extension and Reauthorization Act of 2004; and the Family Entertainment and Copyright Act of 2005. A cursory examination of these amendments suggests that most of them were proposed by powerful business or special interests groups, i.e. not the likes of Alice Author and IndiePress.

[158] Professor Netanel argues that the transformative use model is very contemporary: "Since 2005, the transformative use paradigm has come to dominate fair use case law and the market-centered paradigm has largely receded into the pages of history." Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 768 (2011). "Today, the key question for judicial determination of fair use is not whether the copyright holder would have reasonably consented to the use, but whether the defendant used the copyrighted work for a different expressive purpose from that for which the work was created." *Id.*

[159] 17 U.S.C. §107(1-4) (2000).

are protected by fair use.[160] This reluctance, however, is a contributing factor to the fact that there is depressingly little case law on this precise issue, a fact bemoaned by both judges and scholars.[161] Until there is either a legal precedent from the cases, or an established industry practice allowing reasonable quotation of song lyrics, the present uncertainty and chilling effect will remain.

It is possible, however, that publishers might find themselves logistically unable to authorize authors to quote song lyrics without permission in the books they publish because their insurance companies require them to purchase licenses for all uses,[162] even those which subsequent litigation might find to be fair. If this is the case, then the responsibility for advancing fair use law in this area falls squarely on the shoulders of the authors themselves. Authors might find themselves unable to defy their conservative, risk-averse publishers, but perhaps the rise of self-publishing[163] will provide a viable possibility for some small authors to advance fair use law in this meaningful way.

CONCLUSION

Fiction authors who want to quote song lyrics in their work find themselves in a difficult position. The process of seeking permission to quote can be time-consuming and confusing. Most book publishers are wary of the litigious music industry, and independently negotiated licenses can be expensive.[164]

As a result, the conventional wisdom in book publishing is that fiction authors should not quote song lyrics.[165] Yet writers might have important artistic reasons for wishing to quote. These quotations could contribute to the historical realism of the literature, like the author in the hypothetical described in this Article, and provide an important referential link for the reader. Understandably, fiction authors might wonder how such a transformative use in prose fiction could possibly injure the copyrighted song.[166] While the analysis differs depending on the specific facts posed by each case, this Article argues that the existing copyright defense of fair use should protect many fiction authors who quote fragments of song lyrics in their published work.[167]

The public associates being an artist with pushing boundaries, rethinking conventions, and taking risks. However, the dearth of case law[168] on the type of transformative fair use specifically described in this Article suggests that contemporary

[160] Although, as this Article argues, the factors generally support the fair use defense, making it a less-risky bet than most publishers think.
[161] See *supra* note 27.
[162] Pressure from insurance companies on restaurants is one of the primary reasons there have been few challenges to Warner Brothers Music's dubious claim on "Happy Birthday." *See supra* note 152-153 and accompanying text.
[163] For information on the increasing prevalence of self-publishing and the effect it might have on copyright law, see *supra* note 24.
[164] *See supra* note 32 and accompanying text.
[165] *See supra* note 26 and accompanying text.
[166] *See supra* Part II.A-D.
[167] *See supra* Part IV.
[168] *See supra* note 51.

writers are perhaps being unnecessarily risk averse. While the impetus to protect one's self is certainly understandable, particularly given the damages allowed where there is actual infringement,[169] the unfortunate outcome of this restraint is that the stories themselves are being denied their full potential as art. In other words, the literature suffers. There is, however, a solution to be found in the Copyright Act itself: Quoting song lyrics in a manner which conforms to the four factors listed in Section 107.[170] Future authors pondering whether or not to quote from popular songs in their work are encouraged to consider the statutory considerations governing fair use and, within reasonable limits, quote away.

[169] *See supra* notes 94-103 and accompanying text.
[170] 17 U.S.C. §107(1-4) (2000).